No. 10218

In the United States Circuit Court of Appeals for the Ninth Circuit

ULTRA-VIOLET PRODUCTS, INC., A CORPORATION, PETITIONER

v.

FEDERAL TRADE COMMISSION, RESPONDENT

ON PETITION TO REVIEW AN ORDER OF THE FEDERAL TRADE COMMISSION

BRIEF FOR RESPONDENT

W. T. KELLEY,
Chief Counsel,
JOSEPH J. SMITH, JR.,
Assistant Chief Counsel,
DONOVAN R. DIVET,
Special Attorney,
Attorneys for Federal Trade Commission.

INDEX

AUTHORITIES CITED

Cases:

Miscellaneous: Page

In the United States Circuit Court of Appeals for the Ninth Circuit

No. 10218

ULTRA-VIOLET PRODUCTS, INC., A CORPORATION, PETITIONER

v.

FEDERAL TRADE COMMISSION, RESPONDENT

ON PETITION TO REVIEW AN ORDER OF THE FEDERAL TRADE COMMISSION

BRIEF FOR RESPONDENT

I

STATEMENT OF THE CASE

This is an administrative law proceeding arising upon petition to review and set aside an order to cease and desist issued by the Federal Trade Commission, respondent, pursuant to a Commission complaint charging petitioner with engaging in unfair and deceptive acts and practices in commerce in violation of the Federal Trade Commission Act.[1]

[1] The pertinent provisions of the statute are as follows:

"SEC. 5. (a) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.

"The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce." 52 Stat. 111–112; 15 U. S. C. A. § 45 (a).

"(c) * * * The findings of the Commission as to the facts, if supported by evidence, shall be conclusive." 52 Stat. 112–113; 15 U. S. C. A. § 45 (c).

"SEC. 12. (a) It shall be unlawful for any person, partnership, or cor-

The complaint (R. 1–12) alleged that petitioner, Ultra-Violet Products, Inc., a California corporation having its principal office and place of business in Los Angeles, California, was engaged in the business of manufacturing and selling in interstate commerce a device called "Life Lite," in connection with which petitioner had disseminated false advertisements by means of the United States mails and in interstate commerce by various means. Petitioner's device, it was alleged, was a cold quartz lamp of the type in which a mercury arc is burned in quartz, and was sold, designed and intended for home use by laymen as an artificial means of obtaining the ultra-violet rays of natural sunlight, and for the prevention, treatment and alleviation of various diseases, ailments and abnormal conditions of the human body (R. 1–2).

Typical examples of the statements and representations contained in petitioner's advertisements were set out in the

---

poration to disseminate, or cause to be disseminated, any false advertisement—

"(1) By United States mails, or in commerce by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase of food, drugs, devices, or cosmetics; or

"(2) By any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase in commerce of food, drugs, devices, or cosmetics.

"(b) The dissemination or the causing to be disseminated of any false advertisement within the provisions of subsection (a) of this section shall be an unfair or deceptive act or practice in commerce within the meaning of section 5." 52 Stat. 114–115; 15 U. S. C. A. § 52.

"SEC. 15. For the purposes of sections 12, 13 and 14—

"(a) The term 'false advertisement' means an advertisement, other than labeling, which is misleading in a material respect; and in determining whether any advertisement is misleading, there shall be taken into account (among other things) not only representations made or suggested by statement, word, design, device, sound, or any combination thereof, but also the extent to which the advertisement fails to reveal facts material in the light of such representations or material with respect to consequences which may result from the use of the commodity to which the advertisement relates under the conditions prescribed in said advertisement, or under such conditions as are customary or usual. * * *

"(d) The term 'device' * * * means instruments, apparatus, and contrivances, including their parts and accessories, intended (1) for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals; or (2) to affect the structure or any function of the body of man or other animals." 52 Stat. 116; 15 U. S. C. A. § 55.

complaint (R. 3–6), and it was charged that by their use, and by the use of similar statements and representations not specifically set forth, petitioner had falsely represented that its device was a sun lamp; that it was safe for use in the home for self-treatment without medical supervision; that it would give benefits to the skin and general health comparable to those given by natural sunlight; that the use of the lamp provided a cure, remedy or competent and adequate treatment for chronic, infectious and bacterial skin diseases and ailments, as well as those of fungus origin, and also for asthma, hay fever, bronchitis, colds, sinus trouble, discharges from the ears, barber's itch, ringworm, impetigo, athlete's foot, acne, eczema, psoriasis, shingles, erysipelas, anemia, sores and ulcers; that the use of the device stimulated the tissues of the skin, built up in the body resistance to disease, produced a chemical reaction which kept the blood stream in balance, aided in overcoming a deficiency of white and red corpuscles, produced a tonic effect upon the blood, built up the body's resistance to infection, stimulated the endocrine glands, quieted and soothed the nerves, acted as an antacid, had an alkalizing effect upon the body, improved metabolism, made the body strong, increased vitality, built new tissue, improved mental reactions and the general tone of the body, toned up the nervous system, induced sleep, normalized body chemistry and relieved pain (R. 6–7).

The complaint further alleged that the therapeutic value of petitioner's device was limited to the possible destruction of bacteria on the surface of the skin; that the device did not possess the therapeutic characteristics, and would not accomplish the results or afford users the benefits, claimed in petitioner's advertisements (R. 7–9), and that petitioner's advertisements were also false in that they failed to reveal that the unsupervised use of petitioner's device by persons not trained in its operation, and not skilled in diagnosis, analysis and methods of treatment of diseases, might result in severe burns and other serious and irreparable injury to health (R. 9).

In its answer (R. 12–77) petitioner admitted that it was a California corporation engaged in business in interstate commerce as alleged in the complaint, and that it had advertised

its lamp as there set forth (R. 12–14). It denied, however, that its advertisements were false, misleading or deceptive, denied that the value of its device was limited to the possible destruction of surface bacteria, denied that unsupervised use of the device was dangerous, and affirmatively averred that it would benefit the skin and general health of users as "outlined" in its advertisements (R. 14–15). Petitioner further asserted that "all of the statements, representations, and claims made in its advertisements * * * were made in good faith," and "for the purpose of substantiating" them it cited and quoted excerpts from nineteen articles published in various medical journals (R. 16–18, 20–77). Concluding, petitioner offered to stipulate to discontinue "any further dissemination of such statements, representations and claims as, in the light of present day scientific knowledge, may be contrary to fact," and prayed "an opportunity of presenting briefs in substantiation" of its advertising claims (R. 19).

The matter duly proceeded to trial, and after the taking of evidence on behalf of both the Commission and petitioner, the Commission made its findings as to the facts (R. 77–95), which accord with the allegations of the complaint, concluded that petitioner's practices were in violation of the Federal Trade Commission Act and entered an order to cease and desist (R. 95–98). The only contested provisions of the order are those directing petitioner, in connection with the sale of its Life Lite, to discontinue representing:

> (a) that said lamp * * * affords benefits to the skin or to the general health of the user comparable to those afforded by natural sunlight;
>
> (b) that said lamp constitutes a cure or remedy or a competent or adequate treatment for * * * ringworm, athlete's foot, acne, eczema, [or] psoriasis * * *;
>
> (c) that said lamp constitutes a cure or remedy for sores or ulcers, or that it constitutes a competent treatment therefor except insofar as it may stimulate the healing process in those cases in which the infection causing such conditions is confined to the surface of the skin;

(d) that said lamp possesses any therapeutic value in the treatment of * * * bronchitis * * *;

(f) that said lamp builds up in the body resistance to disease;

(g) that said lamp * * * produces any chemical reaction with respect to the blood stream * * *;

(h) that said lamp builds up the resistance of the body to infection * * *;

(i) that said lamp affords any stimulation to the tissues of the skin in excess of such stimulation as may result from its irritating effect;

(n) that said lamp normalizes the chemistry of the body, improves metabolism, or builds new tissues, except insofar as its use may result in the production of Vitamin D. [R. 96–97.] [2]

Petitioner thereafter filed its petition to review (R. 411–415) and statement of points (R. 415–422), challenging the validity of the above quoted provisions of the Commission's order on the ground that the findings upon which they are based are not supported by substantial evidence.

II

QUESTION PRESENTED

The sole question presented is whether there is substantial evidence to support the Commission's findings as to the facts upon which the challenged provisions of its order to cease and desist are based.

III

ARGUMENT

The applicable law is well settled.

The Commission's findings as to the facts if supported by evidence are conclusive. The statute so provides [3] and this

[2] The quoted provisions are part of paragraph 1 of the order. Petitioner offers no objection to paragraph 2 (R. 97–98) or to paragraph 3 (R. 98), except insofar as the latter is based upon, and prohibits the representations referred to in, the quoted provisions of paragraph 1 (see petitioner's brief, footnote 1, p. 4, and pp. 10, 13, 58).

[3] Federal Trade Commission Act, § 5 (c); 52 Stat. 113; 15 U. S. C. A. § 45 (c); *Federal Trade Commission* v. *Standard Education Society*, 302 U. S.

Court has often so held.[4] The rule applies notwithstanding the fact that the findings relate to matters as to which there is a conflict in expert medical testimony,[5] for the credibility of the witnesses and the weight to be accorded to the evidence are for the Commission, as the fact finding body, to determine,[6]

112, 117 (1937); *Federal Trade Commission* v. *Algoma Lumber Co.*, 291 U. S. 67, 73 (1934); *Federal Trade Commission* v. *Pacific States Paper Trade Assn.*, 273 U. S. 52, 63 (1927).

[4] *Stanley Laboratories* v. *Federal Trade Commission*, 138 F. 2d 388, 393 (C. C. A. 9th, 1943); *American Medicinal Products* v. *Federal Trade Commission*, 136 F. 2d 426, 427 (C. C. A. 9th, 1943); *Lane* v. *Federal Trade Commission*, 130 F. 2d 48, 50 (C. C. A. 9th, 1942); *Alberty* v. *Federal Trade Commission*, 118 F. 2d 669, 670 (C. C. A. 9th, 1941), cert. denied 314 U. S. 630 (1941); *Electro Thermal Co.* v. *Federal Trade Commission*, 91 F. 2d 477, 479 (C. C. A. 9th, 1937), cert. denied 302 U. S. 748 (1937).

[5] *John J. Fulton Co.* v. *Federal Trade Commission*, 130 F. 2d 85, 86 (C. C. A. 9th, 1942), cert. denied 317 U. S. 679 (1942); *Alberty v. Federal Trade Commission*, 118 F. 2d 669, 670 (C. C. A. 9th, 1941), cert. denied 314 U. S. 630 (1941); *Aronberg* v. *Federal Trade Commission*, 132 F. 2d 165, 170 (C. C. A. 7th, 1942); *D. D. D. Corporation* v. *Federal Trade Commission*, 125 F. 2d 679, 680–682 (C. C. A. 7th, 1942); *Neff* v. *Federal Trade Commission*, 117 F. 2d 495, 497 (C. C. A. 4th, 1941); *Dr. W. B. Caldwell, Inc.* v. *Federal Trade Commission*, 111 F. 2d 889, 891 (C. C. A. 7th, 1940); *Justin Haynes & Co.* v. *Federal Trade Commission*, 105 F. 2d 988, 989 (C. C. A. 2nd, 1939), cert. denied 308 U. S. 616 (1939); *E. Griffiths Hughes, Inc.* v. *Federal Trade Commission*, 77 F. 2d 886, 887 (C. C. A. 2nd, 1935), cert. denied 296 U. S. 617 (1935).

Although not apparent from the opinions, the rule was also applied in *Federal Trade Commission* v. *Raladam Company*, 316 U. S. 149 (1942), *American Medicinal Products* v. *Federal Trade Commission*, 136 F. 2d 426 (C. C. A. 9th, 1943), *Philip R. Park, Inc.* v. *Federal Trade Commission*, 136 F. 2d 428 (C. C. A. 9th, 1943), and a number of other cases, in which there was a sharp and substantial conflict in expert testimony as to the therapeutic value of medical preparations. Such a conflict likewise existed in *Federal Trade Commission* v. *Raladam Company*, 283 U. S. 643, 646 (1931), as is apparent from the decision below (42 F. 2d at 433–435), and while the Commission's order was set aside on substantive grounds not here material, the Court stated that its findings were warranted by the evidence.

[6] *Glasser* v. *United States*, 315 U. S. 60, 80 (1942); *National Labor Relations Board* v. *Link-Belt Company*, 311 U. S. 584, 597 (1941); *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U. S. 555, 567 (1931); *Aronberg* v. *Federal Trade Commission*, 132 F. 2d 165, 170 (C. C. A. 7th, 1942); *Keller* v. *Federal Trade Commission*, 132 F. 2d 59, 60–61 (C. C. A. 7th, 1942); *Banning* v. *United States*, 130 F. 2d 330, 335 (C. C. A. 6th, 1942), cert. denied 317 U. S. 695 (1943); *Dr. W. B. Caldwell, Inc.* v. *Federal Trade Commission*, 111 F. 2d 889, 891 (C. C. A. 7th, 1940); *Wholesale Grocers' Assn.* v. *Federal Trade Commission*, 277 F. 657, 663 (C. C. A. 5th, 1922).

This Court has frequently held that it is for the jury, or the court below in the absence of a jury, to pass upon the credibility and the weight

and petitioner cannot ask the Court to "pick and choose bits of evidence to make findings of fact contrary to the findings of the Commission." *Federal Trade Commission* v. *Standard Education Society,* 302 U. S. 112, 117 (1937). In the circumstances, a critical discussion of the evidence relied upon by petitioner in support of its advertising claims is unnecessary. It is sufficient to point to the evidence which supports the Commission's findings, for if the findings are supported by evidence, they will be upheld "regardless of the evidence on the other side," *National Labor Relations Board* v. *Hudson Motor Car Co.,* 128 F. 2d 528, 532 (C. C. A. 6th, 1942); *National Labor Relations Board* v. *J. G. Boswell Co.,* 136 F. 2d 585, 589–590 (C. C. A. 9th, 1943), and the fact that petitioner offered experts who testified contrary to the experts offered on behalf of the Commission "cannot enable the petitioner to contend successfully that there was no substantial evidence to support the Commission's findings." *Justin Haynes & Co.* v. *Federal Trade Commission,* 105 F. 2d 988, 989 (C. C. A. 2nd, 1939), cert. denied 308 U. S. 616 (1939); *Aronberg* v. *Federal Trade Commission,* 132 F. 2d 165, 170 (C. C. A. 7th, 1942).[7]

The Commission's findings in this case are based upon the testimony of two well qualified experts, Dr. Samuel Ayres, Jr. and Dr. Fred B. Moor.

Dr. Ayres is one of the most prominent skin specialists in the City of Los Angeles and is well known throughout the United States (R. 208). He obtained the degrees of Bachelor of Arts from the University of Missouri in 1915, and of Doctor of Medicine from Harvard Medical School in 1919. He interned at Massachusetts General Hospital, where he was also graduate assistant in dermatology for six months, and has practiced in Los Angeles as a skin specialist since 1920 (R. 129). Dr. Ayres has used ultra-violet light in his practice for over twenty years

---

of the testimony of expert medical witnesses. *E. g., Cherry-Burrell Co.* v. *Thatcher,* 107 F. 2d 65, 69 (C. C. A. 9th, 1939); *United States* v. *Alger,* 68 F. 2d 592 (C. C. A. 9th, 1934); *United States* v. *Dudley,* 64 F. 2d 743, 745 (C. C. A. 9th, 1933); *United States v. Albano,* 63 F. 2d 677, 681 (C. C. A. 9th, 1933); *United States Fidelity & Guaranty Co.* v. *Leong Dung Dye,* 52 F. 2d 567, 570 (C. C. A. 9th, 1931), cert. denied 285 U. S. 537 (1932).

[7] The cases cited in footnote 5, *supra* p. 6, are to the same effect.

(R. 146), and a lamp of the same type as petitioner's Life Lite lamp for eight or ten years (R. 129).

Dr. Moor also practices in Los Angeles (R. 155). He is a graduate of the University of North Dakota and the College of Medical Evangelists, and has specialized in pharmacology, therapeutics and physical therapy for twenty years (R. 156).[8] He has also had experience in internal medicine, and has taught pharmacology and therapeutics at the College of Medical Evangelists since 1921 (R. 156–157). Dr. Moor is a consultant of the Council of Physical Therapy of the American Medical Association, Vice President of the American Congress of Physical Therapists, a member of the examining board of physical therapy technicians for the American Register of Physical Therapy Technicians and director of the physical therapy department of White Memorial Hospital of Los Angeles (R. 156, 206). He has used lamps of the Life Lite type for four or five years, and he showed himself to be well informed on the subjects of sun lamps, therapeutic lamps, and ultra-violet rays (R. 157–164, 205–209).

In its brief petitioner emphasizes the fact that neither of the Commission's experts had used its Life Lite. That, however, did not disqualify them from expressing an opinion upon its therapeutic value and effect, nor does it furnish any basis for a contention that their testimony was not substantial.[9] Their general medical knowledge qualified them to testify, and each, as stated above, was thoroughly familiar with and had used in his practice for several years cold quartz lamps of the same type as petitioner's Life Lite (R. 129, 146, 163, 208–209).

---

[8] Physical therapy, sometimes called physiatrics or physiotherapy, is the treatment of disease by physical, non-medical means, such as heat, massage, water, radiation and electricity. See Dorland, The American Illustrated Medical Dictionary (18th ed. 1938), and Stedman's Medical Dictionary (14th rev. ed. 1939).

[9] *John J. Fulton Co.* v. *Federal Trade Commission*, 130 F. 2d 85, 86 (C. C. A. 9th, 1942), cert. denied 317 U. S. 679 (1942); *Neff* v. *Federal Trade Commission*, 117 F. 2d 495, 496–497 (C. C. A. 4th, 1941); *Dr. W. B. Caldwell, Inc.* v. *Federal Trade Commission*, 111 F. 2d 889, 891 (C. C. A. 7th, 1940); *Justin Haynes & Co.* v. *Federal Trade Commission*, 105 F. 2d 988, 989 (C. C. A. 2nd, 1939), cert. denied 308 U. S. 616 (1939); *Goodwin* v. *United States*, 2 F. 2d 200, 201 (C. C. A. 6th, 1924); *Kershaw* v. *Tilbury*, 214 Cal. 679, 8 P. 2d 109, 114–115 (1932).

The expert witnesses called by petitioner were Dr. Roger W. Truesdail, Dr. Philip A. Leighton and Dr. Floyd Roswell Parks. Since, as we shall show, the testimony of the Commission's experts fully supports the Commission's findings, no discussion of the testimony of petitioner's experts is required. Actually, the conflicts between the witnesses were not as substantial as might be inferred from petitioner's brief, but to the extent that their testimony did conflict, the Commission's action in accepting the views of the experts offered on its behalf was entirely reasonable, for while petitioner's experts were undoubtedly well educated and able gentlemen, Dr. Parks was the only one who was a medical doctor or who was shown to have had any medical training or experience. He was a surgeon, however, rather than a dermatologist or physiotherapist (R. 358, 372, 374, 387),[10] and his testimony as a whole evidenced no great familiarity on his part with the use and effect of ultra-violet rays. Dr. Truesdail and Dr. Leighton were chemists (R. 209–210, 266); and neither was shown to have had any training or experience whatever in medicine, dermatology or physiotherapy.

There is no conflict in the evidence as to the physical, as distinguished from the therapeutic, characteristics and nature of petitioner's Life Lite. There are two models, the stand lamp and the hand lamp (R. 102), each being sold with printed directions for use (Comm. Exs. 1 and 2, R. 402–404), and being designed and intended for home use by laymen without medical supervision (R. 128). The hand lamp is intended to be used at a distance of about one inch from the body (R. 106), and may be moved from one part of the body to another (R. 107). If held still at that distance it will produce a first-degree erythema, or redness, akin to sunburn, in ten or twelve seconds (R. 107).[11] The stand lamp is intended to be used at a dis-

[10] As pointed out above, the Commission's experts were specialists in the matters under inquiry, Dr. Ayres being a dermatologist (R. 129) and Dr. Moor a physiotherapist (R. 156), and "The testimony of a specialist is entitled to greater weight than that of a general practitioner." Rogers, Expert Testimony (3rd ed. 1941) 788.

[11] In footnote 8 on page 33 of its brief petitioner says that "Erythema is the medical term for sun burn," citing R. 108. Petitioner's president did testify to that effect, but since there is an issue as to whether petitioner's

tance of from twenty to twenty-four inches from the body (R. 108–109). At this distance some of the stand lamps will produce an erythema in about one minute on the body of a person who is not tanned, others in from one and a half to two minutes (R. 110). Goggles are furnished for use with the lamps (Comm. Ex. 1, R. 402) and each is equipped with an automatic clock which can be set for any period between a half minute and six minutes (R. 111–112).

Both the hand lamp and the stand lamp are the cold quartz type of ultra-violet lamp (R. 113) and are made by bending a quartz tube into the shape desired, removing all gases, and then filling it with a mixture of helium, argon, neon and krypton, under pressure. A few drops of mercury are added, and the tube is then sealed, usually hermetically. When an appropriate voltage is applied to the tube, the ionization of the mercury vapor inside produces a high intensity of ultra-violet light located primarily in the spectral range of 2537 angstrom units (R. 113). An angstrom unit is one fifty-second millionth of an inch, and is one of the units of measurement of the electromagnetic spectrum (R. 119). The spectral range of the sun is from about 2910 to approximately 50,000 angstrom units (R. 158), very few of its rays being below 2900 angstroms (R. 323). The spectral range of petitioner's Life Lite is from about 2537 to 3660 angstrom units, 89.2% of its total energy output, however, being concentrated at about 2537 angstroms (R. 119–120), well below the lowest point in the spectral range of the sun.[12]

Ultra-violet lamps are classified generally as therapeutic lamps and sun lamps, depending upon their spectral range,

---

lamp is comparable to natural sunlight, we might point out that his definition is not exactly accurate. Speaking generally, erythema is a "morbid redness of the skin." It has many causes and there are many varieties of it. "Erythema solaris" is the medical term for sunburn, and while the redness produced by petitioner's lamp is akin to sunburn, it is not erythema solaris. See the definitions of "erythema" in Dorland, The American Illustrated Medical Dictionary (18th ed. 1938), and Stedman's Medical Dictionary (14th rev. ed. 1939).

[12] It is not clear from the evidence whether the output of petitioner's lamp is concentrated at 2537 or at 2540 angstroms, but it was shown that there was no appreciable difference between the two wave-lengths (R. 268, 325).

a sun lamp being one which, speaking approximately, reproduces the spectrum of the sun and emits no wave lengths shorter than 2900 angstroms; a lamp which reproduces shorter wave lengths is a therapeutic lamp (R. 123–124, 279, 292, 325–327). Therapeutic lamps produce redness but do not tan the skin (R. 131–132). Sun lamps do tan (R. 294), and, as Dr. Ayres testified for the Commission, "the tanning procedure * * * is considered to be intimately connected with certain of the benefits of the natural sun" (R. 133). The rays of a therapeutic lamp are also "markedly irritating," for which reason a sun lamp is more suitable for use by laymen (R. 160). It is undisputed that petitioner's lamp is a therapeutic lamp rather than a sun lamp (R. 125, 131, 159, 327).

Speaking generally, Dr. Moor testified for the Commission that petitioner's Life Lite was "Useful chiefly for very superficial infections and * * * to produce irritation of the skin" (R. 164), and that its "only well proven effect" was to aid in maintaining calcium and phosphorous, inhibiting rickets (R. 173), and treating pityriasis rosea (R. 208).[13] The Commission's other expert, Dr. Ayres, said that petitioner's lamp was "useful in the treatment of several skin diseases," but that it had a "very limited field of usefulness" and that he did not believe the "light by itself is likely to produce a cure in conditions like psoriasis or eczema or athlete's foot" (R. 134). Dr. Truesdail, one of petitioner's experts, testified that the "only chemical effect" of Life Lite (R. 254) is to cause "the utilization of the calcium and phosphorous that is going through the alimentary tract of the body" (R. 252).

This evidence alone, we think, fully warranted the Commission's findings, but there was specific testimony in support of each of the nine findings questioned by petitioner.

Benefits Comparable to Those of Sunlight

The Commission charged that since the ultra-violet rays emitted by petitioner's Life Lite were not "comparable to the

[13] Pityriasis rosea is an inflammatory disease of the skin, marked by an eruption of patches of varying size, of a pink color and covered with whitish scales. See Dorland, The American Illustrated Medical Dictionary (18th ed. 1938); Stedman's Medical Dictionary (14th rev. ed. 1939).

ultraviolet rays emitted by natural sunlight," the benefits "to the skin and to the general health" to be derived from petitioner's lamp and those to be derived from natural sunlight were not "comparable" (R. 7–8), and it found that, for the reason stated, such benefits "cannot properly be compared" (R. 91). Accordingly, the Commission ordered petitioner to cease and desist representing that its lamp "affords benefits to the skin or to the general health of the user comparable to those afforded by natural sunlight" (R. 96).

Upon "close consideration," and with the aid of dictionaries, petitioner professes to discover "an ambiguity of potential importance" lurking in this provision of the Commission's order (petitioner's brief, p. 31). Pointing out that the word "comparable" may mean either "*capable* of being compared" or "*worthy* of comparison" (*ibid.*), petitioner contends that it is not clear in which sense the Commission used the term, and argues that it was used in the former sense in the complaint and findings, for which reason it must be ascribed the same meaning in the order, and the order is therefore absurd or "did not follow the Complaint and Findings, and hence was improvident, and should be annulled" (*id.*, pp. 32–33).

We hesitate to believe that counsel advances this argument seriously. The order would, indeed, be absurd if "comparable" were used in the sense of *capable* of being compared, for no two things on earth are incapable of comparison in the sense of being examined for the purpose of discovering their resemblance or differences. That being true, petitioner's argument is self-destructive, for when words are susceptible of two meanings, one reasonable and the other absurd, they are to be given a reasonable meaning. See 35 C. J. 501–502; 49 C. J. 105–107.

We submit, however, that the Commission's complaint, findings and order are not susceptible of the meaning ascribed to them by petitioner.

Petitioner states, and we agree, that the word " 'comparable' was used in the Order in the same sense" in which it was used in the complaint and findings (petitioner's brief, p. 33), and we think it perfectly clear that as there used the word meant

worthy of comparison, like or similar to.[14] This is obvious not only from the expression employed, namely, "comparable to," rather than "comparable with," [15] but also from the context in which the expression was used. The complaint charged, and petitioner admitted in its answer, that petitioner's Life Lite was "sold, designed and intended * * * as an artificial means of obtaining the ultraviolet rays of natural sunlight" (R. 2, 13), and the plain meaning of the complaint and findings was that the benefits to be derived from the use of petitioner's lamp were neither the same as, nor sufficiently valuable to be worthy of comparison with, the benefits to be derived from the sun (R. 6, 7–8, 83, 90–91). Petitioner evidently had no doubt as to the meaning of the word "comparable" as used four times in the complaint (R. 6, 7, 8), for it answered without moving the Commission to make the complaint more definite and certain, and we believe that petitioner understands equally well the meaning of the word as used in the Commission's findings and order.

As for the evidence, it is undisputed that petitioner's Life Lite does not reproduce the spectrum of the sun and is not a sun lamp (*supra* pp. 10–11). In addition to this, Dr. Ayres testified that in his opinion Life Lite would not give benefits to the skin or general health comparable to those given by natural sunlight (R. 132–133, 148–149), and Dr. Moor said that the rays emanating from petitioner's lamp and from the sun "do not have the same biological effects" (R. 163, 182). Petitioner's own expert, Dr. Leighton, testified that there were "relative differences" between such rays, and that "certain wave lengths will be more * * * efficient for one thing, and other wave lengths will be more efficient for another" (R. 289).

---

[14] This is the primary meaning of the term, as indicated by the words given as synonyms for "comparable" in Webster's Dictionary of Synonyms (1942), namely, "Analogous, akin, parallel, similar, like, alike, identical, homogeneous, uniform."

[15] In Webster's New International Dictionary (2nd ed., Unabridged, 1940), "comparable" is defined as follows: "Capable of being compared (with); worthy of comparison (to)."

Ringworm, Athlete's Foot, Acne, Eczema and Psoriasis

The Commission found as a fact that:

> While ultra-violet rays of the wave length emitted by [petitioner's] lamp possess bactericidal properties, such properties are effective only in those cases where the infection sought to be attacked is limited to the surface of the skin. The rays are incapable of penetrating the surface of the skin and destroying bacteria or fungi present below the surface. The use of [petitioner's] lamp therefore does not constitute a cure or remedy or a competent or adequate treatment for such conditions as barber's itch, ringworm, athlete's foot, acne, eczema, psoriasis, shingles, or erysipelas, all of which are due to causes existing below the surface of the skin. [R. 91.]

Petitioner was accordingly ordered to discontinue representing that its lamp constitutes a "cure or remedy or a competent or adequate treatment" for the conditions referred to (R. 96).

The Commission's findings and order are not questioned insofar as they relate to barber's itch, shingles and erysipelas, but they are challenged as to ringworm, athlete's foot, acne, eczema and psoriasis (petitioner's brief, pp. 39–45). Petitioner's argument, however, is almost completely beside the point, for while it asserts that there was no substantial evidence to support the Commission's finding, it actually cites enough of the testimony of the Commission's experts to show that the finding was fully warranted. It will also be noted that none of the testimony of petitioner's experts was contrary to the Commission's conclusion as to the efficacy of petitioner's Life Lite, for the Commission's finding was that the device was not a "cure or remedy or a competent or adequate treatment" (R. 91), whereas the testimony relied on by petitioner was, in substance, merely to the effect that petitioner's Life Lite was "useful," "helpful" or "beneficial" as an "adjunct" in the treatment of the conditions in question. Nothing in the Commission's order prohibits petitioner from truthfully stating the limited therapeutic value of its lamp—what the order prohibits is the

broad and comprehensive representation that petitioner's lamp is a "cure or remedy or a competent or adequate treatment." There was ample evidence that petitioner's representations to that effect were false.

Dr. Ayres testified that petitioner's lamp was "useful in the treatment of several skin diseases," but he said that its bactericidal action was limited to "that type of bacteria which is right at the very surface of the skin" (R. 134), because "most of the rays of the light are filtered out by the upper skin layers" (R. 140). That being true, Dr. Ayres did not "believe the light by itself is likely to produce a cure in conditions like psoriasis or eczema or athlete's foot, or things of that sort" (R. 134, 135, 143–144).

Dr. Ayres further testified that Life Lite would be of "very little" value in treating ringworm (R. 135) and was "not a proper means of treating athlete's foot" (R. 136). He said that "its effect in acne would be very small," and it would be of "very little value in the treatment of acne," because it would not reach the underlying cause of the condition (R. 136, 145). Eczema, Dr. Ayres said, was "simply a symptom of a disease of the skin," that "without finding out the underlying cause, it is perfectly futile to try to treat it," and while Life Lite might "be of some temporary value in eczema" it would not "effect a cure" (R. 137).

As for psoriasis, Dr. Ayres said that it was "another skin condition, the cause of which is entirely unknown;" that a case of "chronic psoriasis" would be "definitely benefited by ultraviolet light," but "an acute case of psoriasis would be definitely aggravated," and since a layman could not diagnose the different types of psoriasis, petitioner's lamp should not be used in the treatment of the condition except under a physician's supervision (R. 138).

Dr. Moor testified that the rays of petitioner's Life Lite "have very little penetrating power" (R. 164, 167), that their bactericidal effect would be superficial, limited to "organisms * * * on the surface" of the skin, and that the lamp was "Useful chiefly for very superficial infections and * * * to produce irritation of the skin" (R. 164). He stated that he doubted whether Life Lite "would be of value in ringworm, al-

though I wouldn't want to be too sure" (R. 168), but said that it was of "No value" in treating athlete's foot (R. 168, 169–170), possessed "little value in acne" (R. 170), that it was "Not usually considered of any value in eczema" and was of "no value" in treating psoriasis (R. 171).

Sores and Ulcers

The Commission found that in the case of sores and ulcers petitioner's lamp "may possibly stimulate the healing process but only in those instances in which the infection causing the condition is confined to the surface of the skin" (R. 91–92). Petitioner was therefore ordered to cease and desist representing that Life Lite

> constitutes a cure or remedy for sores or ulcers, or that it constitutes a competent treatment therefor except insofar as it may stimulate the healing process in those cases in which the infection causing such conditions is confined to the surface of the skin. [R. 96.]

Dr. Ayres testified that he knew of no "chronic skin condition which would be improved * * * or benefited" by petitioner's lamp except to the extent that the lamp might have a "stimulating effect, such as perhaps in the case of a chronic ulcer, but I doubt very much if the light by itself would be sufficient to bring about a cure in even such a condition" (R. 135). He said that it would "Very definitely" be "necessary to have the diagnosis of a physician" before using petitioner's lamp in the treatment of sores and ulcers (R. 139), for the reason that, while the lamp

> might be of some value in the treatment of certain chronic ulcers, by way of stimulating cicatrization,[16] * * * one would have to know what the ulcer was caused by. You could have an ulcer due to syphilis and no amount of light would do it any good. Or you may have an ulcer due to cancer and the use of the light might even aggravate it. [R. 138–139.]

[16] Cicatrization is "A healing process which leaves a scar or cicatrix." Dorland, The American Illustrated Medical Dictionary (18th ed. 1938); Stedman's Medical Dictionary (14th rev. ed. 1939).

As for sores, "using the term in its general scope," Dr. Ayres did not think petitioner's lamp "would be of very much value" in their treatment (R. 143).

Dr. Moor testified that petitioner's Life Lite might "hasten healing" of sores and ulcers because of its "stimulating effect," but it would not "heal" them "by itself" (R. 171).

Petitioner argues that this testimony is not substantial because it is based on Dr. Ayres' and Dr. Moor's opinion that the rays of petitioner's lamp would not penetrate beneath the surface of the skin, whereas they agreed that the lamp activated vitamin D, and, according to the testimony of Dr. Leighton, one of petitioner's experts, such "activation takes place in the corium layer of the skin, which underlies three other distinct layers" (petitioner's brief, p. 46). There is no merit to this contention for three obvious reasons.

First, it is common knowledge that infections causing sores and ulcers are usually found in the subcutaneous tissue *below* the skin. Second, in agreeing that petitioner's lamp activated vitamin D, Dr. Ayres and Dr. Moor did *not* agree that the lamp's rays possessed the penetrating power ascribed to them by Dr. Leighton, who himself frankly conceded, in effect, that there is "sometimes doubt" as to the layer of the skin in which vitamin D activation is induced (R. 307).[17] Third, from the fact that petitioner's Life Lite might penetrate the skin to a sufficient depth to activate vitamin D, it by no means follows that its "radiation strikes the blood stream" (R. 186), or, if so, that the rays of the lamp possess bactericidal properties at that depth.[18]

---

[17] Dr. Leighton explained that it was the exposure of ergosterol and cholesterol, and possibly other sterols, to ultra-violet radiation which produced increased vitamin D activity (R. 346–348), and, if we correctly understand his testimony, he acknowledged that there was some doubt as to just which sterol, if any, was found in any particular layer of skin (R. 307). Dr. Moor testified that "vitamin D is manufactured somewhere in [the] superficial layer of the skin" (R. 186).

[18] It is undisputed that ultra-violet rays of different wave lengths have different therapeutic values and differ in their penetrating qualities (R. 131–132, 159–160, 163, 289, 308–310, 333–336, 340–345; Res. Ex. 2, R. 271; Res. Ex. 3, R. 287).

In giving his testimony at R. 303–307 relative to the absorption of ultra-violet rays by different layers of the skin, Dr. Leighton was speaking of

Bronchitis

The Commission found that, contrary to petitioner's representations, its lamp "possesses no therapeutic value in the treatment of asthma, hay fever, bronchitis, colds, sinus trouble, or discharges from the ears" (R. 92), and ordered petitioner to discontinue advertising otherwise (R. 96). Petitioner objects to the finding and order insofar as they relate to bronchitis on the ground that one of its experts testified that its lamp "was a beneficial adjunct in the treatment of bronchitis," and the testimony in support of the finding and order "was based upon [Dr. Moor's] notion that the rays from [petitioner's] lamp 'do not reach below the surface of the skin' " (petitioner's brief, pp. 47–48).

Neither argument requires discussion. The Commission was not bound to accept as true the testimony of petitioner's expert, and Dr. Moor's view that petitioner's lamp possessed little penetrating power was not only substantial in itself, but was fully corroborated by the testimony of Dr. Ayres (R. 134–135, 140). As for the evidence, Dr. Moor said that bronchitis was "commonly caused by germs in the respiratory tract," that petitioner's lamp did not possess sufficient penetrating power to reach the source of the infection, and had "No direct effect on bronchitis" (R. 167).

---

the absorption qualities of each layer considered individually, and did not testify "with consideration to the fact that the ultra-violet light would travel through some other" layer or substance (R. 307). We have not overlooked this testimony, but we place no particular emphasis on it for the reason that Dr. Leighton subsequently testified that in his opinion, and contrary to the opinions of Dr. Ayres and Dr. Moor, the rays of petitioner's lamp would penetrate through the outer layers of the skin and possess bactericidal properties in the "fourth layer down" (R. 331, 339, 343). In this connection, however, it is interesting to note that in its directions for use petitioner states, "The ultra-violet rays have very slight penetration and for this reason it is desirable to treat that part of the body in which the blood stream is closest to the surface. * * * It is advisable to take treatments in a warm room, as the blood will be closer to the surface of the body than when exposed to a chilly temperature. Under these conditions it is possible to receive a much better reaction than if the cold air is striking the skin and causing the blood to remain in the deeper tissues" (Comm. Ex. 1, R. 402).

Resistance to Disease

The Commission found that petitioner's lamp "is incapable of building up in the body resistance to disease" (R. 92) and ordered petitioner not to represent that it would do so (R. 96). The finding and order are supported by the testimony of both Dr. Ayres and Dr. Moor.

Dr. Ayres said that "from the best opinions that I have been able to find" resistance against disease was "more apt to be built up under conditions of radiation simulating the natural sunlight" than by the rays of petitioner's lamp (R. 141), and that a person who used petitioner's lamp "habitually * * * for a considerable period of time" would not be "less apt to develop a skin disorder than one who did not subject his skin to such treatment" (R. 146).

Dr. Moor testified that "building up resistance to an infection * * * is not an accepted action of ultra-violet radiation" (R. 166, 167), and that building "resistance against disease means a stimulation of antibody [19] formation * * * and ultra-violet radiation has not been shown to have that effect" (R. 172). Asked directly whether petitioner's Life Lite would "have any tendency to build up resistance in the body against disease," he answered unequivocally, "No" (R. 172).

Notwithstanding this evidence, petitioner attacks this part of the Commission's order on the ground that since it is conceded that Life Lite will frequently so activate the production of vitamin D as to prevent or remedy calcium deficiency diseases, the order is too broad because it forbids petitioner to advertise that its lamp "will build resistance to *any* disease" (petitioner's brief, pp. 48–49). As pointed out above, however, the phrase "building resistance to disease" means "a stimulation of antibody formation" (R. 172), and vitamin D and calcium are not antibodies. Petitioner, moreover, did not confine its advertising claims to calcium deficiency diseases—it broadly represented

[19] An antibody is "Any substance in the blood-serum or other fluids of the body which exerts a specific restrictive or destructive action on bacteria or other noxa, or neutralizes their toxin * * *." Stedman's Medical Dictionary (14th rev. ed. 1939).

that Life Lite would "build resistance against disease" in general (Comm. Ex. 21, R. 410),[20] which it will not do. The Commission was therefore fully warranted in unqualifiedly prohibiting that broad and general representation,[21] which is all that its order does prohibit. There is nothing in the order which forbids petitioner from truthfully representing the extent to which its lamp may tend to build resistance against any *specific* disease caused by vitamin D deficiency.

Chemical Reaction with Respect to the Blood Stream

The Commission found that petitioner's lamp "does not produce any chemical reaction with respect to the blood stream, nor is it of any assistance in overcoming a deficiency of either white or red corpuscles. It has no tonic effect upon the blood" (R. 92). Accordingly, petitioner was ordered to discontinue its representations to the contrary (R. 97).

Pointing to inapposite fragments of Dr. Moor's testimony (petitioner's brief, p. 51) and citing certain testimony of its own experts relating to the formation of tri-calcium phosphate (*id.*, p. 52), petitioner challenges the order insofar as it prohibits the representation that Life Lite "produces any chemical reaction with respect to the blood stream" (R. 97). Contrary to the implication of petitioner's brief, however, none of the testimony referred to is opposed to the Commission's finding.

Dr. Truesdail, one of petitioner's experts, said that his experience with rats showed that petitioner's lamp would activate the production of vitamin D "in the skin" (R. 243), and that vitamin D was "a catalyst" [22] which "causes the utilization of

[20] In Comm. Ex. 25–A (not printed) petitioner represented that the "improved tone of the body" resulting from the use of Life Lite "constitutes a power to resist the invasion of disease," and in Comm. Ex. 31 (not printed) it said that the effect of Life Lite "extends to the whole body system," "builds direct resistance to infection" and increases "the general resistance."

[21] See *Lane* v. *Federal Trade Commission*, 130 F. 2d 48, 51–52 (C. C. A. 9th, 1942); *Macher* v. *Federal Trade Commission*, 126 F. 2d 420 (C. C. A. 2nd, 1942); *Century Metalcraft Corp.* v. *Federal Trade Commission*, 112 F. 2d 443, 446–447 (C. C. A. 7th, 1940).

[22] A catalyst is an agent which produces a reaction without itself entering into the reaction. Dorland, The American Illustrated Medical Dictionary (18th ed 1938); Stedman's Medical Dictionary (14th rev. ed. 1939).

the calcium and phosphorous" (R. 252, 257) present in the alimentary tract and the blood stream (R. 243, 252). This, Dr. Truesdail testified, was a chemical change *in the body,* resulting in "forming new bone tissue by forming tri-calcium phosphate" (R. 243, 249). He said that the

> specific chemical reaction [resulting from the use of petitioner's device] would be a catalytic effect, which would permit the union of calcium and phosphorous ions to produce the chemical compound tri-calcium phosphate in the bones. [R. 249.]

And this, he declared, was the "only chemical effect" petitioner's lamp would have (R. 254). As petitioner states, "Dr. Leighton testified generally to the same effect (R. 290)" (petitioner's brief, p. 52).

This testimony supports, rather than opposes, the Commission's finding that petitioner's lamp produces no chemical reaction with respect to the blood stream. The finding is also supported by the testimony of Dr. Ayres and Dr. Moor, the Commission's experts.

Dr. Ayres was asked generally whether petitioner's lamp would "produce any chemical reaction in the body, so far as the blood is concerned," and replied that "it might perhaps improve the calcium metabolism to some degree" (R. 141). Dr. Moor stated that the *only* chemical reaction in the body to be derived from the use of Life Lite was the activation of vitamin D, which "influences the absorption of calcium and phosphorous" (R. 172). He testified that the lamp would not "keep the blood stream in balance" or "aid in overcoming a deficiency of the white or red corpuscles" (R. 173), and that it would not "produce a tonic effect on the blood" (R. 174). When asked specifically whether the lamp would "have any effect at all upon the blood," he replied unequivocally, "No" (R. 174).[23]

[23] In view of Dr. Moor's clear and specific testimony, petitioner cannot detract from its substantiality, as it attempts at page 51 of its brief, by combining bits and pieces of his testimony removed from their context. For example, petitioner refers to Dr. Moor's testimony that the use of Life Lite corrects "calcium deficiency of the blood" to some extent (R. 184). But Dr. Moor did not mean by that that petitioner's lamp produced a chemical reac-

There is nothing in the Commission's order which prohibits petitioner from truthfully advertising the effect of its lamp upon the utilization of calcium and phosphorous in the blood stream, but that effect does not constitute a "chemical reaction with respect to the blood stream," and the evidence fully warranted the Commission in ordering petitioner not to represent that such a reaction was produced by its lamp.

Resistance to Infection

The Commission found that petitioner's lamp "is incapable of building up the body's resistance to infection" (R. 92), and ordered petitioner to cease representing that it would do so (R. 97). Petitioner contends that the finding is unwarranted because in testifying that petitioner's lamp was ineffective for "building up resistance to an infection," Dr. Moor, one of the Commission's experts, employed the phrase "building up resistance" to infection as meaning "treating" infection,[24] and for the further reason that it was conceded that petitioner's lamp had a bactericidal effect, and "killing * * * bacteria," so

---

tion in the blood stream. He only meant that, by causing the production of vitamin D, the lamp had the effect of improving the "calcium metabolism" (R. 182–183), which "involves the deposition * * * in the bone structure" of the calcium present "in all tissues of the body" (R. 183). Petitioner also points to the fact that Dr. Moor agreed that "general exposure to ultra-violet radiation" would produce certain changes in the blood. But petitioner can take no comfort from that, for the spectral range of its lamp is so limited that exposure to its rays is not "general exposure to ultra-violet radiation" (*supra* pp. 10–11).

[24] Petitioner raises no question as to the sense in which the phrase "building up the body's resistance to infection" was used by the Commission in its findings and order, and it is obvious that it was used in its commonly accepted sense, *i. e.*, building up the body's power or capacity to avert, ward off or prevent infection. It is also clear that this was the sense in which petitioner used the expression in its advertisements. In Comm. Ex. 31 (not printed) it represented that "LIFE LITE offers you a sound investment in 'HEALTH INSURANCE' for your whole family!;" that "The ultimate effect of controlled exposure extends to the whole body system," and that the lamp "builds direct resistance to infection" and increases "the general resistance." In Comm. Ex. 25–A (not printed) petitioner advertised that the "improved tone of the body" resulting from the use of its lamp "constitutes a power to resist the invasion of disease."

petitioner claims, "helps the body to resist * * * infection" (petitioner's brief, pp. 52–54). There is no merit to the contention.

Dr. Moor assigned no such factitious meaning to the phrase "building up resistance" to infection as that claimed by petitioner. He was asked whether petitioner's lamp "would be of any value in the treatment of chronic infections" (R. 166). Having just testified that Life Lite was of very little value in the treatment of various ailments, that its use was contraindicated in others and might actually be harmful in some (R. 164–166), Dr. Moor replied:

> * * * if you mean building up resistance to an infection, that is not an accepted action of ultra-violet radiation. [R. 166.]

Reading this testimony in its context, it is clear that Dr. Moor did not mean "treating an infection" when he referred to "building up resistance to an infection," but, on the contrary, intended to draw a distinction between treatment and prevention, and to testify that petitioner's lamp was not only of little therapeutic value in *treating* infection, but was of no value as a means of imparting to the body increased power to *prevent* infection. There can certainly be no misunderstanding of his subsequent testimony on cross-examination that he did not agree, and it had not been proven, that one effect of petitioner's lamp was to build "Increased resistance of the body to infection" (R. 191–192).

Dr. Ayres, the Commission's other expert, testified to the same effect, stating, as previously indicated, that he did not think it was true that a person, "not experiencing any particular skin disorder," who used petitioner's lamp "habitually * * * for a considerable period of time, would be less apt to develop a skin disorder than one who did not subject his skin to such treatment" (R. 146).

The substantiality of the testimony of Dr. Moor and Dr. Ayres is in no degree diminished, nor is the Commission's finding opposed, by the fact that petitioner's lamp possesses the power to kill bacteria located upon the surface of the skin

(*supra* p. 15). The lamp is applied for only very short intervals of time and over comparatively small areas of the body.[25] Its bactericidal effect is therefore not continuous, and does not extend to the whole body surface. Killing germs on the surface of a small area of the skin may prevent infection by the germs killed, but it does not lessen the danger of infection from *other* germs, nor does it impart to the *body itself* any increased power to ward off or avert infection.

Stimulation to the Tissues of the Skin

Finding that "Aside from its irritating effect, [petitioner's] lamp affords no stimulation to the tissues of the skin" (R. 92), the Commission ordered petitioner to discontinue representing that its lamp affords any such stimulation in excess of that which "may result from its irritating effect" (R. 97). Asserting that the Commission's experts repeatedly testified that Life Lite had a "stimulating effect upon the skin," petitioner says that the "evidence does not give any support at all to this phase of the Findings and Order" (petitioner's brief, pp. 54–55). Petitioner is correct in stating that the Commission's experts testified that petitioner's lamp had a stimulating effect upon the skin, but they used the word "stimulating" in a narrow sense, as synonymous with "irritating," [26] and their testimony fully supports the Commission's finding and order.

Asked whether petitioner's device would "stimulate the tissues of the skin," Dr. Ayres replied, "It depends on what you mean by 'stimulate.' * * * It might stimulate the formation of new granulation tissues," as, for example, by causing "vigorous peeling" in the case of acne (R. 140), but

> I don't think you get any great deal of stimulation * * *. The effect of producing the redness means that the blood vessels are dilated, and there might per-

[25] See petitioner's directions for using the various models of Life Lite. Comm. Ex. 1 (R. 402) and Comm. Exs. 3–7 (not printed).

[26] To stimulate is to excite or arouse the system in general, or any special system or organ, to increased functional activity. To irritate is to bring about a reaction of the tissues by the application of a stimulus. Stedman's Medical Dictionary (14th rev. ed. 1939) ; Dorland, The American Illustrated Medical Dictionary (18th ed. 1938).

haps be some degree of stimulation in that regard, but I don't think that it would have any lasting effect or be of any particular value * * * other than in stimulating new granulation in ulcers, perhaps. [R. 141.] [27]

Dr. Moor testified that petitioner's lamp might be useful in treating "chronic ulcers," because "you need stimulation to hasten healing" (R. 171), and the lamp "would change a chronic inflammation into a more acute one, and thereby probably promote healing somewhat" (R. 172). Asked whether petitioner's lamp "would stimulate the tissues in the skin," he replied that it was "likely to be damaging to the human tissues" and therefore "would not be desirable for most open wounds" (R. 171). And he specifically stated that the rays of petitioner's lamp were "markedly irritating" (R. 160), "much more irritating to the skin" than the rays of natural sunlight (R. 163), and that one of the two principal uses of the lamp was "to produce irritation of the skin," a "stimulating effect on the skin" (R. 164).

The Commission's experts thus plainly connected stimulation and irritation, and the clear import of their testimony is that petitioner's lamp stimulates by irritating. Further than this, petitioner not only admits, but emphasizes the fact, that its lamp will produce a redness of the skin akin to sunburn, and it is significant, we think, that none of petitioner's witnesses assigned to its lamp any stimulating quality other than that resulting from its irritating effect. Indeed, one of petitioner's experts, Dr. Leighton, testified that the capacity of the lamp to produce vesiculation, or blistering, was greater than that of a sun lamp (R. 281, 283, 350), and another, Dr. Parks, expressly noted its "irritating" properties, stating that the lamp would irritate "much more effectively" than other "irritating substances" (R. 386).

[27] Granulation tissue is new connective tissue formed in the process of healing ulcers and wounds and ultimately forming a scar. See definition of "tissue" in Dorland, The American Illustrated Medical Dictionary (18th ed. 1938). The expression "stimulating new granulation," as used in the testimony quoted, simply means promoting the growth of new tissue by irritating old tissue.

Normalizing Body Chemistry, Improving Metabolism and Building New Tissues

The final specific provision of the Commission's order to which petitioner objects is that prohibiting petitioner from representing that its lamp

> normalizes the chemistry of the body, improves metabolism, or builds new tissues, except insofar as its use may result in the production of vitamin D. [R. 97.]

Petitioner does not contend that the finding[28] upon which the Commission based this provision of its order is not supported by evidence. The finding will therefore be presumed to be so supported,[29] and there is no necessity to discuss the evidence on which it is based.[30] Petitioner's objection to the order is that its meaning is uncertain (petitioner's brief, pp. 55–58).

Conceding it to be "likely that the Commission did not have any such intention," petitioner nevertheless contends that the clause "except insofar as its use may result in the production of vitamin D," applies "only to the normalizing of the chemistry of the body," rather than "to all three of the biological effects enumerated in the wording preceding" the clause, and the order therefore allows petitioner "to advertise only that its lamp would cause production of vitamin D, and nothing more" (petitioner's brief, p. 57). Accordingly, petitioner says, the order should be amended to prohibit it from representing that its lamp "normalizes the chemistry of the body, improves metabolism, or builds new tissues, except insofar as such effects are related to the production of vitamin D resulting from the use of the lamp" (*id.*, p. 58).

It seems to us that petitioner is quibbling, and we disagree with both its reasoning and its conclusion. But there is no

---

[28] R. 92. The finding is quoted in full at page 56 of petitioner's brief.

[29] *Federal Trade Commission* v. *A. McLean & Son*, 84 F. 2d 910, 911 (C. C. A. 7th, 1936), cert. denied 299 U. S. 590 (1936); *Federal Trade Commission* v. *Inecto, Inc.*, 70 F. 2d 370 (C. C. A. 2nd, 1934); *National Harness Manufacturers' Assn.* v. *Federal Trade Commission*, 261 F. 170, 171 (C. C. A. 6th, 1919).

[30] Supporting testimony appears at R. 172–175, 182–183, 190–191, 202, 253–254, 257.

necessity to debate the point. The only question is what the order means, and that, we submit, is clear. The excepting clause applies to each of the three biological effects referred to in the order, and its plain meaning is almost exactly what petitioner claims its meaning should be. The order does not restrict petitioner to advertising "only that its lamp would cause production of vitamin D, and nothing more," but permits petitioner to represent that insofar as use of the lamp may result in the production of vitamin D, to that extent the lamp not only normalizes the chemistry of the body, but also improves metabolism and builds new tissues. That is substantially all petitioner claims it has a right to say, and there is nothing in the order which requires clarification.

The only difference in the meaning of the order as entered, and as petitioner thinks it should be modified, is that petitioner treats the production of vitamin D as a certainty, whereas the Commission deals with it as a possibility. The evidence fully warrants the Commission's action, for vitamin D is not produced by petitioner's lamp itself; the vitamin is manufactured in the skin from the sterols of the skin, which are activated by exposure to the rays of the lamp (R. 172, 186, 346, 348). If the necessary sterols are absent from the skin, or are present in insufficient quantities, it follows that no amount of exposure to petitioner's lamp could result in the production of vitamin D, and there is no evidence that such sterols are either present, or present in significant quantities, in the skin of every individual. Petitioner's president himself testified in respect to the production of erythema that "the skin of different individuals varies so greatly that no two react [to petitioner's lamp] exactly the same" (R. 110, 122), and Dr. Truesdail, one of petitioner's experts, remarked in connection with his experiments on treating rickets in rats by using petitioner's lamp to activate the production of vitamin D, "The degree of the healing is not always identical in all animals" (R. 226).[31]

[31] See also R. 147–148, 151–154, 166. It may also be noted that in its directions for the use of its lamp petitioner itself seems to recognize that varying reactions may be expected from different individuals, stating, "Blonds and brunettes react differently to the ultra-violet. A brunette will usually require longer exposures while the fair-skinned blonde generally reacts readily. Age must also be considered; the very old and the very young demanding greater caution." Comm. Ex. 1 (R. 402).

Paragraph 3 of the Order

All of the provisions of the Commission's order heretofore discussed appear in paragraph 1 of the order. We think that they should be affirmed as entered; but should the Court hold otherwise, no modification of paragraph 3 is required.[32] By its very terms paragraph 3 is limited, so far as here pertinent, to enjoining only those representations "prohibited in paragraph 1" (R. 98). Any changes made in paragraph 1 will therefore necessarily, and without further action on the part of the Court, be reflected in paragraph 3, restricting its scope accordingly.

IV

CONCLUSION

It is submitted that the Commission's findings as to the facts are supported by substantial evidence and that its order to cease and desist was properly entered. The Commission therefore prays that petitioner's petition to review be dismissed and that, pursuant to the statute,[33] the Court enter its decree affirming the Commission's order and commanding petitioner to obey the same and comply therewith.

Respectfully submitted,

W. T. KELLEY,
Chief Counsel,

JOSEPH J. SMITH, Jr.,
Assistant Chief Counsel,

DONOVAN R. DIVET,
Special Attorney,
Attorneys for Federal Trade Commission.

WASHINGTON, D. C., *January 1944.*

---

[32] Petitioner does not object to paragraph 2 of the order (R. 97–98), stating that it "is content to comply with this part of the Order, and raises no issue concerning it" (petitioner's brief, footnote 1, p. 4).

[33] "To the extent that the order of the Commission is affirmed, the court shall thereupon issue its own order commanding obedience to the terms of such order of the Commission." Federal Trade Commission Act, § 5 (c), 52 Stat. 113; 15 U. S. C. A. § 45 (c).

U. S. GOVERNMENT PRINTING OFFICE: 1944